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No. 187

In the Supreme Court of the United States

OCTOBER TERM, 1944

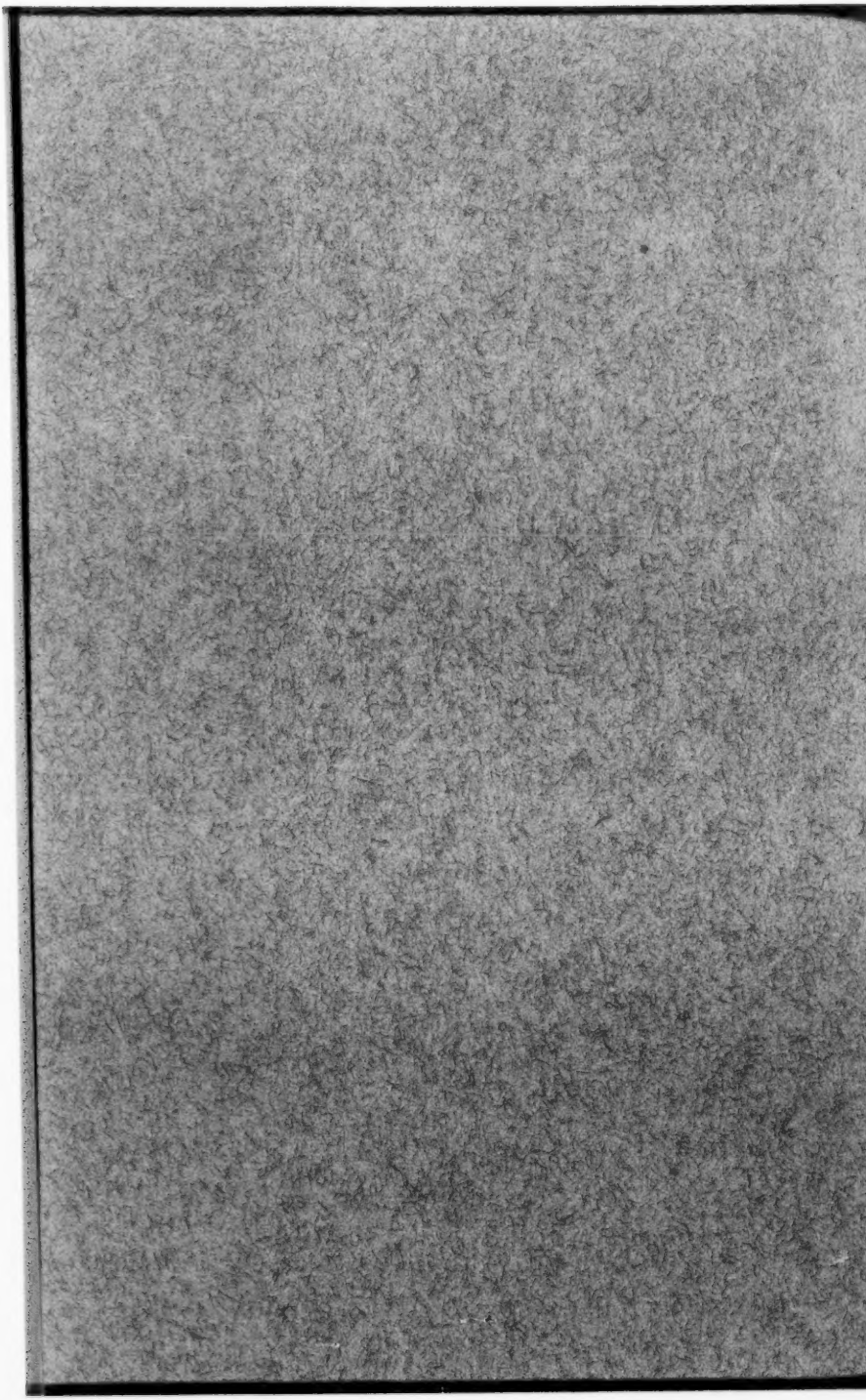
THE EVERGREENS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION



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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 43–62) is reported in 47 B. T. A. 815. The opinion of the Circuit Court of Appeals (R. 298–305) is reported in 141 F. (2d) 927.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 20, 1944 (R. 305). The petition for a writ of certiorari was filed on June 23, 1944. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In an earlier proceeding between the same parties the Board of Tax Appeals determined the March 1, 1913, fair market value of petitioner's *improved* cemetery lots to be $1.55 per square foot. An issue in the present proceeding was the March 1, 1913, fair market value of petitioner's *unimproved* cemetery lots. In making such valuation was the Board bound, as petitioner contends, to accept the prior valuation of the improved lots as the necessary premise of its computation, and deduct therefrom the cost of improvements? Or was the Board entitled, as it and the court below held, to consider all the relevant evidence bearing upon the value of the unimproved lots?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.
>
> (a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—
>
> * * * * *
>
> (14) *Property Acquired Before March 1, 1913.*—In the case of property acquired before March 1, 1913, if the basis otherwise determined under this subsection, adjusted

(for the period prior to March 1, 1913) as provided in subsection (b), is less than the fair market value of the property as of March 1, 1913, then the basis for determining gain shall be such fair market value.* * *

* * * * *

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 113 (a) (14)–1. *Property acquired prior to March 1, 1913.*—The basis as of March 1, 1913, for determining gain in the case of property acquired prior to that date, is the basis otherwise provided for such property under section 113 (a), adjusted for the period prior to March 1, 1913, or the fair market value of the property as of March 1, 1913, whichever is higher.

The basis as of March 1, 1913, for determining loss in the case of property acquired prior to that date is the cost or other basis provided for such property under section 113 (a) adjusted as required by section 113 (b), but without reference to the fair market value of the property as of March 1, 1913.

* * * * *

What the fair market value of property was on March 1, 1913, is a question of fact to be established by competent evidence. * * * All relevant facts and elements of value as of the basic date should be considered in every case.

STATEMENT

The facts in this case, which are not in dispute here, may be summarized as follows (R. 43–53):

The Commissioner determined income tax deficiencies against the taxpayer for the years 1929 to 1933, inclusive, based upon profits derived from the sale of cemetery land for burial purposes. In so doing the Commissioner had used 46¢ and 11¢ as the March 1, 1913, fair market value for all sales made in those years. The taxpayer sought a redetermination for each year by appeal to the Board of Tax Appeals (R. 44).

The cases for all of these years were consolidated, and from the evidence adduced at the hearing the Board found that taxpayer's land held for sale on March 1, 1913, was divided into two classes, *viz.*, (a) land which was fully improved and ready for sale without further development, and (b) land which was partially improved, but could be made available for sale, consisting of portions of sections lying along the eastern boundary of the cemetery, comprising about 1,400,000 square feet, an area which contained no drainage or water systems (R. 44).

The Board found in that proceeding that there were, in all, more than 4,000,000 square feet of unsold land available for cemetery purposes on March 1, 1913; that the sales made in the years 1929 to 1933, inclusive, were all from land which on March 1, 1913, was improved land (R. 234),

and that the fair market value of the improved land available for sale for burial purposes on March 1, 1913, was at that date $1.55 a square foot (R. 44–45).

Thereafter the Commissioner determined deficiencies in taxpayer's income taxes for 1934 and 1935—the years involved in the present proceeding—again alleging profit from the sale of cemetery land. In so doing he used the rate of 30¢ per square foot as the March 1, 1913, fair market value of the land. The taxpayer again sought redetermination by the Board of Tax Appeals, alleging that the prior determination of the Board was *res judicata* in this proceeding. In the years 1934 and 1935 the taxpayer sold both improved and unimproved lots (R. 43, 52–53).

The Board held that its prior determination was *res judicata* only as to the valuation of the improved land, and not *res judicata* as to the unimproved land (R. 59). Accordingly, the Board proceeded to find the value of the unimproved land (R. 60–61).

During the year 1934 the taxpayer sold to the City of New York a total of 326,700 square feet of land out of the area which at March 1, 1913, was not improved. No sales of lots or graves were made in 1929 to 1933, inclusive, in that area (R. 47). This sale to the City constitutes the bulk of the dispositions here in question.

The area which was unimproved on March 1, 1913, remained in the same general condition until the year 1934 at which time a portion thereof was fully improved and renamed. When this was done that portion was as completely improved and as desirable for burial purposes as any of the taxpayer's other fully improved land. The cost of improvement of that portion of the partially improved area, as of March 1, 1913, was 11½¢ per square foot. The cost, as of March 1, 1913, of converting other partially improved land into improved land was 13¢ a square foot. All of the March 1, 1913, unimproved land, if fully improved, would have been comparable in availability and marketability to other fully improved land (R. 48–50).

During the period from 1900 to 1912 the taxpayer sold 807,392 square feet of cemetery land at an average selling price of $1.24 per square foot. During 1912 and 1913 sales for cemetery purposes were made out of improved portions at an average selling price of $1.55 and $2 per square foot (R. 49). The yearly average of interments subsequent to 1913 was less by 300 than prior thereto (R. 50).

The taxpayer's books for all years subsequent to 1912 showed a substantial net operating profit, but a loss, based upon the claimed March 1, 1913, value of land sold, appeared in each income tax return through 1933 (R. 51). At December 31,

1912, the taxpayer carried its cemetery land on its books at a value of $550,000 and in its capital stock tax returns filed for the years 1916 to 1926, inclusive, signed and sworn to by its officers, the taxpayer valued its real estate at $607,000, or approximately 15¢ per square foot for its cemetery land (R. 52). The taxpayer was willing in 1934 to sell 326,700 square feet of its partially improved land to the City of New York at a price of $224,175, as an alternative to having a road constructed through the heart of its cemetery (R. 52).

The Board determined from the foregoing evidence that the March 1, 1913, fair market value of the partially improved land held for sale at that date was 35¢ per square foot (R. 53). It also held that the determination of the value of the improved land was no longer open because of its prior decision. The Commissioner accepted the latter ruling; hence only the March 1, 1913, value of unimproved land is in issue here. The Circuit Court of Appeals for the Second Circuit, in an opinion by Judge Learned Hand, affirmed the order below (R. 305).

ARGUMENT

The court below properly rejected the taxpayer's contention, in support of its plea of *res judicata,* that since in the prior proceeding the Board had found the March 1, 1913, value of im-

proved cemetery lots, the March 1, 1913, value of unimproved cemetery land could be computed only by deducting the cost of improvements from the previously determined value of improved lots.

Petitioner erroneously assumes that the differences in value between improved and unimproved land must necessarily be measured by the cost of improvement. Improvement may enhance the value of land far beyond the cost of improvement: for example, improvement may shorten the time ordinarily needed to dispose of the property. In *Montrose Cemetery Co.* v. *Commissioner,* 309 U. S. 622, this Court affirmed a ruling that the Board could consider the time element as an important factor in valuation, and that the value of cemetery land is not conclusively established merely by deducting the cost of improvement from the March 1, 1913, realized sales price upon improved lots. See also *Oak Woods Cemetery Ass'n* v. *Commissioner,* 111 F. (2d) 863 (C. C. A. 7), certiorari denied, 308 U. S. 616. The time factor is especially relevant with respect to unimproved cemetery lots since, as the Board properly observed (R. 58), it may justifiably be assumed that such property will be the last sold.

We submit, therefore, that notwithstanding its earlier determination that the March 1, 1913, fair

market value of the improved lots was $1.55 per square foot, the Board was not required to hold that the March 1, 1913, fair market value of the unimproved lots could be determined only by deducting the cost of improvements, as of March 1, 1913, from the value of the improved lots. The Board correctly considered itself free to inquire into all factors relating to the March 1, 1913, fair market value of the unimproved lots. In our view of the case there is no occasion to review the interesting and illuminating analysis made by the court below of the extent to which a fact previously determined can conclusively establish a "mediate datum" in a later suit between the parties. The question here is not whether the Board was required to accept $1.55 per square foot as the value of the improved lots. It is, rather, whether acceptance of that figure necessarily bound the Board to a particular method of determining the value of the unimproved lots, namely, subtraction of the cost of improvements from the value of the improved lots. Petitioner's contention that the Board was so bound can be sustained neither as a matter of logic nor of economics.

CONCLUSION

The decision below is correct. There is no conflict of authorities. We respectfully submit that the petition for a writ of certiorari should be denied.

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